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By Deputy *[Signature]*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ELIZABETH LAKE,

Plaintiff,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, LYLE QUASIM,
MARY LAFOND, MARY CLAIRE
RUTHERFORD,

Defendant.

Case No. C98- 5014 JKA

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

THIS MATTER having come on for trial before the undersigned Judge of the above entitled court, February 1-8, 1999; the plaintiff appearing personally with her attorney, Christopher Bawn; the defendants appearing through State Attorney General, Christine O. Gregoire, with their attorneys, Stewart A. Johnston and El Shon Richmond, Assistant Attorneys General; and the Court having heard the testimony of the parties and witnesses and the arguments of counsel and having considered the exhibits admitted in evidence, and being fully advised, now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The plaintiff, Elizabeth Lake (now Elizabeth), seeks injunctive relief and damages arising out of the revocation of her appointment as a Clerk Typist 2 with the Washington State Department of Social and Health Services, Child Study and Treatment Center. She claims damages for negligent

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1 infliction of emotional distress, as well as damages under RCW 49.60, and 42 U.S.C. § 2000e, et. seq.

2 The plaintiff, Elizabeth Lake (now Elizabeth), was born 1975 to Larry Lake
3 and Donna . Both parents advised the plaintiff as a young child that she was of Native American
4 ancestry. Throughout her childhood school years she held herself out to be of Native American ancestry
5 both informally with her peers and friends, and more formally through the North Thurston School District
6 where she availed herself of programs and opportunities made available to students who identified
7 themselves as being of Native American ancestry. Unlike past generations of her fathers family who had
8 felt a sense of "shame" attached to their Native American heritage, the plaintiff proudly announced it.
9 School records clearly indicate that this identity was accepted without reservation (Ex.20). There is
10 absolutely nothing about the plaintiff's physical appearance that would cast the slightest doubt on her
11 claimed Native American Heritage, and in fact, her appearance clearly supports her claim. Although all
12 witnesses for the defense state that they never believed the defendant was intentionally misrepresenting
13 her status, there is a strong inference that she did not appear Native American, inasmuch as Mary LaFond
14 indicated in a letter to the plaintiff that she was unable to visibly verify her protected group status. Both
15 of plaintiffs parents believed themselves to be of Native American Ancestry, however they were raised
16 with the notion that while they should take pride in their heritage, there was an element of shame attached
17 to it in the non-Native American community, which created internal conflict as to the advisability of
18 revealing their heritage. A notable example of this concern is evidenced by the birth certificate of the
19 plaintiff's father, Larry Lake, which identifies both his parents as "W", (Exh. 2).

20 Plaintiff's employment history with the State of Washington began during her high school years
21 when she held a cooperative education position with the State of Washington Department of Revenue.
22 Following graduation from high school plaintiff submitted an application for employment with that
23 department (Exh.22). In completing the Affirmative Action Information section she circled the
24 "Amer.Indian" box under the "Race/Ethnic Origin" section. The application advised that "Verification of
25 protected group status may be required prior to appointment." She was hired for the summer.

26 Thereafter, plaintiff held other jobs and attended college. In February of 1996, plaintiff was hired
27 by the Washington State Department of Transportation to fill positions on a temporary basis. Virgil
28 Clarkson, Resource Manager for the DOT testified that she indicated she was American Indian on her

1 application, they discussed her Native American heritage on more than one occasion, but he did not utilize
2 that information in assigning her to temporary positions. Although he testified that "qualification" was
3 the first priority in making these assignments, he did acknowledge that her ethnic background helped with
4 the department's diversity statistics. The affirmative action claim for DOT did not apply to temporary
5 employees, therefore "verification" was not an issue. Plaintiff responded to a State of Washington Job
6 Opportunity recruitment bulletin for Intermediate Level Clerical Jobs with a window for applications
7 beginning March 6, 1996 and ending November 20, 1996 (Exh.84). This exhibit identified the State of
8 Washington as an "equal opportunity employer," but neither offered nor sought further information in that
9 regard.

10 On October 7, 1996, plaintiff notified Virgil Clarkson that she had been selected for a permanent
11 position by the Washington State Department of Labor and Industries and gave two weeks notice (Ex.23).
12 Her hiring by Labor and Industries effective October 21, 1996, was confirmed by their letter of November
13 4, 1996 (Ex. 24). On her first day of employment with Labor and Industries (October 21, 1996) plaintiff
14 completed an Affirmative Action and Emergency Information Questionnaire (Ex.A-32), where her
15 "Cooperation is requested in furnishing this important information. This information will contribute
16 toward updating the Personnel database." Plaintiff checked the "race or culture" as "American Indian"
17 which was defined on the form as "A person with origins in any of the original peoples of North America
18 and who maintains cultural identification through documented tribal affiliation or community
19 recognition." The form further stated: "The information that you provide will require confirming
20 documentation." Interestingly, the stated purpose of Ex.A-32 is "to establish if employee is entitled to
21 bonus vacation days and establish seniority." The plaintiff's position with DOT was as a Data Entry
22 Operator 2.

23 On November 5, 1996, plaintiff interviewed for a Clerk Typist 2 position at the Department of
24 Social and Health Services' Child Study and Treatment Center (Exh.A-2). Her application, signed
25 November 5, 1996, contained in Part 7., **Affirmative Action Information**, wherein she was asked for her
26 "voluntary cooperation in responding to the questions . . ." In response to the question: "**What race
27 or culture do you consider yourself?**" She checked the box "**American Indian**". She was then asked
28 to "**identify name of the enrolled or principal tribe . . .**" To that inquiry she filled in the words

1 **“Cherokee/Chickasaw/Choctaw”**. Nowhere on the Affirmative Action portion of the Application is
2 there any reference to “verification”. The application defines American Indian as **“a person with origins**
3 **in any of the original peoples of North America and who maintains cultural identification through**
4 **documented tribal affiliation or community recognition.”** (While non-party employees of the State
5 testified that they interpret the words “community recognition” to mean “Native American community
6 recognition”, the court finds, without language indicating a more restrictive definition, it to mean the
7 community at large.) Plaintiff certified “that this information is true and accurate to the best of my
8 knowledge.” On November 6, 1996, she was offered and accepted the position, with a start date of
9 November 25, 1996.

10 On November 21, 1996, (after plaintiff had given notice to DOT of her November 25, 1996 start
11 date with DSHS), plaintiff was contacted by Tamrat Anebo with Labor and Industries and advised that she
12 must “submit documentation confirming your American Indian status by NEXT WEEK.” (Ex.A-35).
13 This exhibit contains the first evidence of any communication to the plaintiff regarding “+3 status”. It
14 does not, however, define +3 status. Plaintiff responded to Tamrat Anebo that day and arranged a
15 meeting including her father for the next day – her final day of work with DOT. Plaintiff and her father
16 met with Tamrat Anebo and his supervisor Margarita Mendoza de Sugiyama on November 22, 1996,
17 plaintiff’s last day of work at DOT. Plaintiff’s father explained the family history, but provided no
18 written documentation, and expressed a certain degree of hostility regarding the necessity of the inquiry.
19 Although it is unclear as to exactly what plaintiff was told she would need to verify her American Indian
20 status, Tamrat Anebo testified that he probably told her she would need a Tribal Enrollment Card, which
21 she did not have. Inasmuch as it was plaintiff’s last day on the job she explained that she would be unable
22 to provide documentation before she left. The plaintiff specifically inquired as to the necessity to provide
23 the documentation to Labor and Industries inasmuch as it was her last day of work. Tamrat Anebo advised
24 her that unless she is re-employed with Labor and Industries they had no reason to request the
25 documentation. Nonetheless, on December 12, 1996, Labor and Industries re-coded the plaintiff as
26 “Caucasian” because “employee has not responded to our request” (Ex.A-35).

27 Plaintiff began her employment with Child Study and Treatment Center (CSTC) on November 25,
8 1996 as scheduled. She was one of three new employees hired as Clerk Typist 2. Plaintiff was advised

1 that she was a probationary employee for six months. Unbeknownst to plaintiff she had been #32 of 32
2 candidates on a referral register. She was on the register as a +3 candidate because she had designated
3 herself as an American Indian when asked to identify "what race or culture she considered herself," and
4 the agency's affirmative action goals showed American Indians as an under-represented protected group at
5 Child Study and Treatment Center for that job category. On that date she was asked to complete
6 Employment Eligibility Verification Form (Form I-9) (Exh.A-4) which is required by the United States
7 Department of Justice, Immigration and Naturalization Service, to substantiate eligibility for employment
8 within the United States. It was also required by the New Employee Checklist (Exh.A-5). Although a
9 Native American Tribal Document was on the list from which the employee could choose, it was not
10 required of plaintiff at that time, and the completed form was approved by CSTC. Plaintiff also completed
11 the Personnel Questionnaire (Ex.A-7) which stated that "This Form Must be Completely Filled out Prior
12 to Your being Placed on the Payroll," even though it later states under Affirmative Action Reporting that
13 the information is voluntary. Plaintiff designated herself as American Indian. The form contains no
14 mention of a need to verify.

15 Plaintiff was directed to complete the Employee Protected Group Status – Data Update (Ex.A-8)
16 which indicated "the information that you provide might require verification." The attachment indicated
17 the deadline for turning in this document was November 1, 1994. Defendants claim the plaintiff refused to
18 sign it, which is understandable.

19 On December 3, 1996, plaintiff was contacted by Mary LaFond, Chief Executor Officer and
20 Appointing Authority for CSTC regarding her need to verify her American Indian status. Ms. LaFond was
21 a long time employee of DSHS who had held positions of responsibility and authority. Plaintiff was told
22 she was a "waste of money" without proper verification. Plaintiff advised Ms. LaFond that her father had
23 the information and a meeting was scheduled with plaintiff's father the following day. On December 4,
24 1996, plaintiff, her father - Larry Lake, Ms. LaFond, and Sue Johnson, Human Resource Assistant for
25 CSTC met. Mr. Lake let it be known that he felt the request for verification was being used in a
26 discriminatory manner against Native Americans. He shared painful family memories connected to his
27 being Native American, explaining his family's hesitancy to publicly disclose their Native American
28 heritage, and in fact their attempts to pass themselves off as white. He did, however produce copies of 1)

1 Elizabeth Lake's , 1975 birth certificate - *which pursuant to Washington State Regulations at*
2 *the time of her birth does not state her race* - showing her father to be Larry Lake, 2) Larry Lake's
3 1949 birth certificate - showing his mother to be 18 year old Agnes Kathleen , 3) an
4 uncertified paper without letterhead naming Kathleen (d.o.b. 31) as a child of Lonnie Edward
5 and Lula Pearl , and 4) an uncertified paper without letterhead designating information
6 located at the Chickasaw Council House, in Tishomingo, Oklahoma as recorded in the 1902 census under
7 census #184 listing Lonnie E. as age 1 with roll #602. Mary LaFond indicated that the material
8 would be sent to OEO for approval, and that "we have 30 days to get the right material." On that same
9 day Sue Johnson sought the assistance of Frances Bailey, DSHS Region V Affirmative Action Officer.
10 Ms Johnson, however, failed to attach all the supporting documents furnished by plaintiff and her father
11 (Ex.A-10,A-11,A-24,A-25,A-26). On December 6, 1996, plaintiff followed up with a letter to Sue
12 Johnson with more information regarding the source of the documents submitted on December 4, which
13 bore no letterhead (Ex.A-21). On December 8, 1996, plaintiff indicated her position that a request for
14 further proof was unlawful and unnecessary (Ex.A-22).

15 On December 10, 1996, Mary LaFond notified the plaintiff in writing that her selection for the
16 Clerk Typist 1 position resulted from a referral as an under-represented protected group member. She
17 further indicated that she was "visually unable to determine the protected group of which you are a
18 member," and advised that DSHS policy required that plaintiff provide acceptable documentation to
19 support her protected group member status. An attachment listed categories of protected groups and
20 documentation requested. The Documentation Requested section under the American Indian category is
21 vague in that it includes the language "**or other verifiable proof.**" Since the information is requested of
22 the employee, the inference is that it would be left to the employer to verify it's authenticity should they
23 feel the need. This is pertinent with regard to the Chickasaw 1902 enrollment and census numbers
24 furnished by plaintiff and her father. The letter is unclear as to the deadline for verification, and in any
25 event it is inconsistent with Ms. LaFond's statement in the December 4 meeting. Plaintiff was referred to
26 Frances Bailey, the DSHS Region V Affirmative Action Officer whose acknowledged role is to "assist"
27 agencies and employees in affirmative action and equal opportunity matters. It appears that this office did
28 little other than act as another layer of referral, and not a very good one at that. Plaintiff contacted

1 morning of January 10, 1997, plaintiff and her union representatives met with Ms. LaFond and Mary
2 Claire Rutherford. Plaintiff was exceedingly distraught at this meeting, and asked whether she was to
3 work out her shift or leave immediately. She was told by defendants she could leave immediately if she
4 wanted the day without pay.

5 It is undisputed that she was competent at her job and got along well with her co-workers. There is
6 no evidence, direct or indirect, that would suggest she had failed to meet the expectations of CSTC other
7 than her alleged failure to verify her Native American status as a +3 applicant. It is also clear that the
8 plaintiff had no notice that she was selected for the position on any basis other than merit, until sometime
9 after she commenced work and training on November 25, at which time she was led to believe that she
10 was selected because of her American Indian declaration. There is no evidence that the +3 system of
11 inserting the names of "protected group members" in the hiring registers was ever explained to the
12 plaintiff or any person who answers the affirmative action questions. There is nothing to suggest to any
13 applicant that answering the questions will do anything other than protect from discrimination in the hiring
14 process, as opposed to giving them a "leg up."

15 Defendants claim that plaintiff's race inured to her benefit for the reason that she would not have
16 been considered for the position without the affirmative action +3 designation. The lack of explanation
17 and information as to the process before seeking plaintiff's "voluntary" designation, the defendants
18 application of the affirmative action plan to processing plaintiff's employment application, selection,
19 appointment, verification, and revocation was discriminatory in that the very process identified by
20 defendants to provide equal opportunity was never divulged, and its negligent application resulted in the
21 plaintiff's loss of a position because of her race.

22 Following the revocation of her appointment, plaintiff sought other employment and embarked on
23 a "mission" to prove her identity. She worked tirelessly, ultimately receiving an official Certificate of
24 Citizenship in the Chickasaw Nation dated March 6, 1998. In order to obtain the citizenship certificate she
25 had to renounce any relationship to the other tribes she believes to also be a part of her heritage –
26 including Cherokee and Choctaw. She has made every effort to remain employed and is currently
27 employed 25 hours per week as a "sign" interpreter for hearing impaired students in the North Thurston
28 School District.

1 Prior to these events plaintiff had been diagnosed with post traumatic stress syndrome (PTSD) in
2 counseling for feelings of panic and fear following automobile accidents. She has been and remains in
3 counseling alleging insecurities with regard to her employment, particularly a fear of encounters with
4 supervisors or others who may be in a position to adversely affect her job status. These feelings of
5 emotional distress are real to the plaintiff, however the court finds that to the extent she may suffer from
6 PTSD, it did not originate with the events giving rise to this litigation, but was exacerbated by them. At
7 the least she suffers from an adjustment disorder resulting from the events leading up to the revocation of
8 her appointment as a Clerk Typist 2 with the Department of Social and Health Services, Child Study and
9 Treatment Center.

10 The difference between plaintiff's income since the revocation of her appointment by DSHS and
11 the income she would have made had her appointment not been revoked, assuming her employment
12 situation remains unchanged through the year 2000, amounts to \$25,061. She has incurred \$2,500 in
13 reasonable and necessary counseling expenses, and it is reasonable to expect that she will incur an
14 additional \$2,500 in counseling expenses. She has incurred the cost of medical insurance premiums in the
15 sum of \$2,800 which would have been assumed by her employer had she remained employed with DSHS.

16 On November 10, 1997, plaintiff received a Notice of Right to Sue within 90 days from the Civil
17 Rights Division of the U.S. Department of Justice, under Title VII of the Civil Rights Act of 1964, as
18 amended, 42 U.S.C. §2000e, et seq. against Washington State Department of Social and Health Services.
19 Child Study and Treatment Center.

20
21 **CONCLUSIONS OF LAW**

- 22 1. The court has jurisdiction over the parties and subject matter of this litigation.
23 2. Plaintiff's claims for injunctive relief and invasion of privacy were dismissed by the court at the
24 close of the plaintiff's case. Although defendants encouraged plaintiff to obtain a tribal enrollment
25 card, she did not do so until after the revocation of her appointment. At that point the act was
26 voluntary. Her Freedom of Association claim is not sufficiently substantiated. Plaintiff has
27 submitted insufficient evidence to support a claim based on a hostile work environment.

8

1 3. The actions of Mary LaFond and Mary Claire Rutherford, acting on behalf of the Department of
2 Social and Health Services, Child Study and Treatment Center, and the actions of human resource
3 and equal opportunity personnel for DSHS, individually and collectively were unreasonable,
4 negligent, and discriminatory and constitute negligent infliction of emotional distress, and were in
5 violation of RCW 49.60 and 42 U.S.C. § 2000e, et. seq., in that they:

- 6 a) misrepresented to plaintiff the need for a tribal enrollment card as necessary
7 documentation for verification of her protected group status,
8 b) failed to advise her that “community recognition” or “other verifiable proof” would be
9 acceptable verification of her protected group status,
10 c) failed to honor their own department’s directive precluding the specification of required
11 documentation for verification,
12 d) referred the request to Frances Bailey for determination without supplying Ms. Bailey
13 all the documentation tendered by the plaintiff,
14 e) failed to accept the proffered verification materials, especially in light of the plaintiffs
15 physical appearance,
16 f) offered the plaintiff a position of employment without advising her prior to acceptance
17 of their verification demands,
18 g) imposed unreasonable time limits for verification, particularly considering the nature of
19 the documentation requested, all of the circumstances, and the already existing six
20 month probationary period,
21 h) failed to exhaust resources within the Region V DSHS Affirmative Action Office, by
22 not consulting their own Indian Policy Officer,
23 i) invited the plaintiff to complete the Affirmative Action Information portion of her
24 application on the basis of the State’s need to “assess . . . many talents and skills”,
25 without advising plaintiff of 1) the need to verify, 2) the true reason for the request,
26 and 3) the foreseeable adverse employment consequences of answering the question:
27 “What race or culture do you consider yourself?”
28 j) demanded verification without understanding the policy, and without reasonably

1 applying the policy, and

2 k) demanding that one claiming Native American protected group status furnish proof of
3 membership in a race-related organization, when no such race-related organizational
4 membership is required of members of any other racially protected group.

5 4. That plaintiff should be awarded damages as follows:

6 a) Loss of income -- \$25,061.

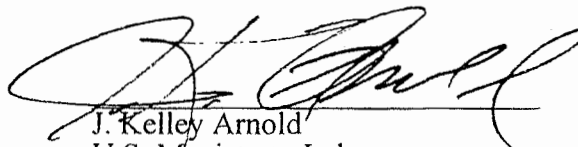
7 b) Past and future medical expenses -- \$5,000.

8 c) Medical insurance premiums incurred -- \$2,800.

9 d) General Damages -- \$60,000.

10 e) Costs and attorneys fees as might hereafter be assessed.

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12 DATED: February 9, 1999.

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15 J. Kelley Arnold
16 U.S. Magistrate Judge
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